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No. 86-1304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS WEST,

Petitioner,

v.

CONRAIL, a foreign corporation;
BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES, LOCAL 2906, and ANTHONY VINCENT, *et al.*,

Respondents.

On a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENTS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906 AND ANTHONY VINCENT

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The citations to the opinions below, the basis for invoking this Court's jurisdiction, and the statutory provisions involved in this case are set forth in petitioner's brief at pp. 2-3 and we therefore do not reprint them here.

COUNTERSTATEMENT OF THE CASE

From February 9, 1981 to November 27, 1981, petitioner Thomas West was employed by respondent Con-

solidated Rail Corporation ("Conrail") as a mechanic. West worked in a bargaining unit for which respondent Local 2906, Brotherhood of Maintenance of Way Employes ("the Union") was the exclusive representative.

On November 27, 1981, West was discharged by Conrail. The reason for the discharge was that several days earlier, four bottles of beer had been discovered in a company truck in which West had been riding.

Respondent Anthony Vincent, West's union representative, filed a grievance on West's behalf alleging that West's discharge was in breach of the collective bargaining agreement between Conrail and the Union. When that grievance was denied by Conrail at the first step of the grievance procedure, the Union appealed the grievance.

On February 1, 1984, Conrail notified the Union that it would reduce West's dismissal to a suspension for the period in which he had been out of work. West was notified of Conrail's decision by letter dated February 9, 1984, and West returned to work on February 14, 1984. West understood that "the Union was . . . successful in getting me my job back." Certification of Thomas West in Opposition to Motions For Summary Judgment, ¶ 7, January 21, 1985.

On September 24, 1984—more than seven months after returning to work—West filed the instant complaint in the United States District Court for the District of New Jersey alleging that the Union and Vincent (collectively referred to hereafter as "the Union") had breached the duty of fair representation ("DFR") in representing West, and that Conrail had violated its collective bargaining agreement with the Union by discharging him. West mailed copies of the summons and the complaint to the defendants on October 11, 1984, and the defendants acknowledged receipt on various dates from October 12 to October 22, 1984.

On November 1, 1984, the Union moved to dismiss West's complaint as barred by the six-month statute of limitations contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), and applicable to hybrid fair-representation/breach-of-contract litigation. West responded to that motion by claiming that his causes of action had not accrued until March 25, 1984, five months and twenty-nine days before his complaint was filed. West based this claim on a "certification" he filed in which he stated that on March 25, 1984, he had been told by a fellow employee, Michael Thornton, that he, Thornton, "was convinced that the Union and Vincent were not trying to do anything for our cases." Certification ¶ 8. The certification stated that based on this conversation West "finally realized that the Union and Vincent were simply pactifying me." *Id.* ¶ 9.

Rather than conducting discovery and litigating the question of whether West knew or should have known prior to this (alleged) March 25th conversation that West had been reinstated in February pursuant to a settlement of his grievance, the Union agreed to assume, for purposes of its motion to dismiss, that West's cause of action did not accrue until March 25, 1984. The Union contended that even on that assumption, West's complaint was untimely because West did not take any steps to serve the complaint until October 11, 1984, more than six months after the cause of action (assumedly) had accrued (and more than two weeks after West's complaint had been filed).[1]

On February 20, 1985, the district court dismissed West's complaint, holding that a fair-representation com-

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[1] Respondent Conrail, which had filed a motion for summary judgment on timeliness ground at the same that that the Union had moved to dismiss the complaint, took the same position as the Union in response to West's "certification." Both the Union and Conrail reserved the right to litigate the issue of when West's cause of action had accrued in the event that it were held that West's failure to serve the complaint within six months of March 25, 1984, did not itself render the suit untimely.

plaint must be filed and served within a six-months time period. On December 31, 1985, the United States Court of Appeals for the Third Circuit (per Stapelton, J.) affirmed the dismissal.

SUMMARY OF ARGUMENT

In *DelCostello v. Teamsters*, 462 U.S. 151, 155 (1983), this Court "conclude[d] that § 10(b) should be the applicable statute of limitations governing [a hybird duty-of-fair-representation/breach-of-contract] suit." That holding, and the reasoning on which it rests, compels the conclusion that the complaint in such a suit must be filed and served within six months after the causes of action asserted in the suit accrue.

A statute of limitations "incorporates [the legislature's] judgment on the proper balance between the policies of repose and the substantive policies of enforcement embedded in the [particular] cause of action" to which the statute applies. *Wilson v. Garcia*, —— U.S. ——, 53 L.W. 4481, 4483 (April 17, 1985). Because there is no sure calculus for fixing that balancing point, the federal courts do not invent time limits for federal causes of action not governed by an express statute of limitations; instead courts "rely[] on the [legislature's] wisdom in setting a limit . . . on the prosecution of a closely analogous claim" by "borrowing" the statute of limitations for the analogous claim. *Johnson v. Railway Express Agency*, 421 U.S. 454, 464 (1975). And because a statute of limitations "is understood fully only in the context of the various circumstances that suspend it from running," *id.* at 463, when a statute of limitation is borrowed it generally controls "questions of tolling and application," *Wilson v. Garcia, supra. See* pp. 7-8 *infra.*

Section 10(b), in terms, allows would-be-claimants six months to file and serve a charge. This statute differs from—and reflects a different value judgment than the

judgment underlying—a limitations provision that allows six months for filing and an additional period of time to effect service. The service requirement is thus an integral part of the timeliness rule established by § 10(b), and must govern the timeliness of those causes of action to which § 10(b) is applied. Pp. 8-9 *infra.*

This conclusion is confirmed by a review of the reasoning that led the Court in *DelCostello* to hold that § 10(b) governs hybrid fair-representation/breach-of-contract suits. The Court in *DelCostello* concluded that § 10(b) is "designed to accommodate a balance of interests very similar to that at stake here," 462 U.S. at 169, and thus it is especially appropriate in the present context to follow the general rule of resolving "questions of tolling and application" by reference to the borrowed law. Indeed, to do otherwise would disserve the interest in "the relatively rapid final resolution of labor disputes" and the interest in achieving "'uniformity' among procedures followed for similar claims," *DelCostello*, 462 U.S. at 168, 171—interests that underlie § 10(b) and that led the Court in *DelCostello* to borrow that statute for fair-representation cases. Pp. 9-15 *infra.*

Petitioner advances two contrary arguments, neither of which can withstand analysis.

First, petitioner contends that there is a "normal federal rule," which petitioner traces to Rule 3 of the Federal Rules of Civil Procedure, under which the filing of a complaint satisfies the statute of limitations for a federal cause of action. But Rule 3 does not so provide; it states that filing a complaint commences an action, but does not indicate whether commencement suffices to satisfy a particular statute of limitations. And the cases on which petitioner relies, while containing occasional bits of broad dictum, establish only that where the applicable statute of limitations in terms requires that an action be "brought," "initiated," "filed," "or commenced" within a specified period of time, Rule 3 controls the

determination of what steps are required to commence that action. None of the cases petitioner cites, nor any other authority of which we are aware, holds that where the statute of limitations that has been borrowed for a particular federal cause provides that filing and service must take place within a specified period, the judiciary is free to nullify the service requirement of that statute. Pp. 15-18 *infra*.

Petitioner alternatively argues that "adoption of a rule requiring service within six months would have the effect of substantially shortening the time period within which DFR complaints must be filed." Pet. Br. at 20. But this argument simply assumes an *a priori* answer to the very question that is in dispute here. And in advancing this argument, petitioner ultimately asks this Court to decide on its own what is the appropriate period of time to allow plaintiffs in hybrid fair-representation/breach-of-contract cases to file and serve their complints, rather than to rely on the answer provided by Congress in enacting § 10(b). Pp. 18-20 *infra*.

ARGUMENT

In *DelCostello v. Teamsters*, 462 U.S. 151 (1983), the "issue presented" was "what statute of limitations should apply" to a "suit by an employee . . . against an employer and a union alleging that the employer had breached a provision of a collective-bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings." *Id.* at 154. The Court resolved that issue by "conclud[ing] that § 10(b) [of the National Labor Relations Act, 29 U.S.C. § 160(b)]"—which in term, establishes the limitations period for filing unfair labor practice charges with the National Labor Relations Board ("NLRB" or the "Board")—"should be the applicable statute of limitations governing the suit, both against the employer and against the union." 462 U.S. at 155.

Section 10(b) in terms requires that an unfair labor practice charge both be filed with the NLRB and served on the respondent within six months. As we proceed to show, under *DelCostello*'s holding and the reasoning on which that holding rests, the courts below properly dismissed as untimely the instant suit in which service was not effected within § 10(b)'s six-month limitation period.[2]

A. A statute of limitations "incorporates the [legislature's] judgment on the proper balance between the policies of repose and the substantive policies of enforcement embedded in the [particular] cause of action" to which the statute applies. *Wilson v. Garcia*, —— U.S. ——, 53 L.W. 4481, 4483 (April 17, 1985). There is no sure calculus for making that value judgment and fixing the balancing point; thus, while "[s]tatutes of limitations . . . have long been respected as fundamental to a well-ordered judicial system" because of the "importance of the policies underlying . . . [such] statutes," *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), it is nonetheless true that "any statute of limitations is necessarily arbitrary," *Johnson v. Railway Express Agency*, 421 U.S.

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[2] *DelCostello* arose under the National Labor Relations Act and the instant case arises under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). But, as petitioner notes, each of the six "court of appeals to consider the issue has concluded that the NLRA's six-month limitations period should also be borrowed for DFR actions in industries subject to the RLA," and the instant case "was litigated in the lower courts on that assumption." Pet. Br. at 13 n.5. Accordingly, petitioner "do[es] not argue in this Court that the six-month limitations period does not apply to this case." *Id.*

This is not to say that hybrid fair-representation/breach-of-contract litigation under the two statutes is in all respects identical. *Compare Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972) *with Vaca v. Sipes*, 386 U.S. 171 (1967); *Csozek v. O'Mara*, 397 U.S. 25 (1970) *with Bowen v. United States Postal Service*, 459 U.S. 212 (1983). *See generally Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969) ("[e]ven rough analogies [between the RLA and the NLRA] must be drawn circumspectly with due regard for the many differences between the statutory schemes").

454, 463 (1975). For that very reason the federal courts have refused to engage in "the drastic sort of judicial legislation" that would be entailed in "judicially devis-[ing] . . . time limitations" for federal causes of actions not governed in terms by an express statutory limitations provision. *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 703-04 (1966). Instead the courts " 'borrow' the most suitable statute or other rule of timeliness from some other source," *DelCostello*, 462 U.S. at 158. In so doing, the courts "rely[] on the [legislature's] wisdom in setting a limit . . . on the prosecution of a closely analogous claim." *Johnson v. Railway Express, supra*, 421 U.S. at 464.

"Any period of limitations . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action." *Johnson v. Railway Express, supra*, 421 U.S. at 463. Accordingly, when a statute of limitations is borrowed, not only "the length of the limitations period" but also the "closely related questions of tolling and application are to be governed by [the borrowed] law." *Wilson v. Garcia, supra*, 53 L.W. at 4483.[3] These rules are all part of the "legislature's wisdom" which is to be "relied upon," *Johnson v. Railway Express, supra*, 421 U.S. at 464, in borrowing a statute of limitations.

B. Section 10(b), as we stated at the outset, provides that

> no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board *and the service of a copy thereof upon the person against whom such charge is made* . . .

This language makes it manifest that Congress decided in enacting § 10(b) to allow would-be-claimants six months to file *and serve* a charge; if the claimant fails

[3] *See also Board of Regents v. Tomanio, supra*; *Chardon v. Fumero Soto*, 462 U.S. 650, 657 (1983).

to do so, the "policies of repose," *Wilson v. Garcia, supra*, 53 L.W. at 4483, incorporated in that provision prevail.

Such a statute of limitations differs from—and reflects a different value judgment than the judgment underlying—a limitations provision that allows a claimant six months simply to file a complaint and an additional period of time to effect service. Indeed, despite petitioner's attempt to treat § 10(b) as if that provision "created [a] six-month period" and a separate "service requirement[]," Pet. Br. at 23, the fact of the matter is that § 10(b) establishes a single, unitary timeliness rule requiring that a charge be filed and served within six months of the events complained of. Thus, what the Court said in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), regarding the state statute at issue in that case is equally true of § 10(b): the "statute is a statement of a substantive decision by the legislature that actual service on . . . the defendant is an integral part of the several policies served by the statute of limitations." *Id.* at 751. Accordingly here, as in *Walker*, "the service rule must be considered part and parcel of"—indeed "an integral part of"—the "statute of limitations," *id.* at 752, and therefore must govern the timeliness of those causes of action to which § 10(b) is applied.[4]

C. The conclusion that a hybrid fair-representation/breach of contract complaint is untimely unless the complaint is filed and served within six-months of the alleged wrongful acts is confirmed by a review of the reasoning

[4] The parade of horribles that petitioner claims would flow from applying the § 10(b) service requirement in fair representation cases *assumes* that receipt of the complaint (and even proof of service) within six months will be required. *See* Pet. Br. at 18-20. It should be noted in this connection that, as the court below observed, Pet. App. 4a, the NLRB has provided by rule that service is effected upon mailing. 29 C.F.R. § 102.113(a). Because petitioner's complaint was not mailed until more than six months after his cause of action accrued, there is no occasion in this case to decide whether the NLRB's rule should be "borrowed" in the fair-representation context.

that led the Court in *DelCostello* to hold that "§ 10(b) should be the applicable statute of limitations in such suits." 462 U.S. at 155.

The *DelCostello* Court began by observing that in cases in which "there is no federal statute of limitations expressly applicable," there is a "general preference for borrowing state limitations period." 462 U.S. at 158 n.12. This preference, however, is not to be " 'mechanically applied' " where state statutes are "unsatisfactory vehicles for the enforcement of federal law." *Id.* at 161-62. Where that is true, the Court stated, "we have declined to borrow state statutes but have instead used timeliness rules drawn from federal law . . ." *Id.* at 162.

The *DelCostello* Court went on to conclude that hybrid fair-representation/breach-of-contract lawsuits fall within this latter category. The Court reasoned that there is "no close analogy in ordinary state law" to such claims, and that the state-law analogies that are available "suffer from flaws, not only of legal substance, but more important, of practical application in view of the policies of federal labor law and the practicalities of . . . litigation." *Id.* at 165. Some state statutes—in particular, those governing actions to vacate arbitration awards—"provide very short times in which to sue, and thus "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights." *Id.* at 166.[5] But the alternative state-law analogies—principally, tort statutes—"would preclude the relatively rapid final resolution of labor disputes favored by federal law," *id.* at 168; indeed the Court posited that the grievance-arbitration machinery which lies " 'at the very heart of the system of industrial self-government' " could " 'easily become unworkable' " by the application of tort limitations periods, *id.* at 168-69.

[5] Most states allow only 90 days to file an action to vacate an arbitration award, and it was that time period that the Court in *DelCostello* deemed not "long enough." *See* 462 U.S. at 166 & n.15. Petitioner is thus wrong in implying (*see* Pet. Br. at 20) that *DelCostello* establishes the inadequacy of any limitations period shorter than six months.

Having thus identified the deficiencies in the state-law analogies, the Court in *DelCostello* reasoned as follows:

> These objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is. In this case, however, we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels. We refer to § 10(b) of the National Labor Relations Act . . . [*Id.* at 169]

Given the "family resemblance" and "substantial overlap" between hybrid fair-representation/breach-of-contract claims and the causes of action to which § 10(b) in terms applies, *id.* at 170, the Court stressed "the close similarity of the considerations relevant to the choice of a limitations period" in both instances, *id.* at 170-71:

> "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.' Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, as well as the clear congressional indication of the proper balance between the inter-

ests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this." [462 U.S. at 170-71; citations omitted]

In two subsequent cases this Court has elaborated on the reasoning of *DelCostello*. In *Wilson v. Garcia*, *supra*, 53 L.W. at 4483, the Court explained that in *DelCostello* "we . . . declined to apply a state statute of limitations when we were convinced that a federal statute of limitations for another cause of action better reflected the balance that Congress would have preferred between the substantive policies underlying the federal claim and the policies of repose." And in *Burnett v. Grattan*, 468 U.S. 42, 52 n.14 (1984), the Court, in refusing to borrow for federal civil rights causes of action under 42 U.S.C. § 1981 a state statute of limitations governing the filing of complaints with a state administrative agency, explained the seemingly contrary decision in *DelCostello* as follows:

> In *DelCostello* we held that the limitations period fixed by § 10(b) . . . for filing unfair labor practice claims with the National Labor Relations Board offered the most analogous limitation period for suits alleging breaches of the collective bargaining agreement. The importance of uniformity in the labor law field and "the realities of labor relations and litigation," informed our decision *not* to adopt a state statute of limitations that would be at odds with the purpose of the substantive federal law. Congress, for whatever reason, sees no need for national uniformity in all aspects of civil rights cases. Moreover, the state administrative statute here, unlike the federal statute we relied on in *DelCostello*, is not functionally related to Congress' policy enacted in the relevant substantive law. [Citations omitted; emphasis in original]

Since *DelCostello* borrowed § 10(b) to govern hybrid fair-representation/breach-of-contract cases because that

statute of limitations is "designed to accommodate a balance of interests very similar to that at stake here," p. 11 *supra*, and since the balance Congress struck in § 10(b) was to allow six months for filing and service, it is especially appropriate in the present context to follow the general rule of resolving "questions of tolling and application" by reference to the borrowed law. *See* p. 8 *supra*. Indeed to do otherwise would disserve the very interests that underlie § 10(b) and that led the Court in *DelCostello* to borrow that statute for fair-representation cases.

Section 10(b) reflects Congress' determination to promote "the relatively rapid final disposition of labor disputes." *DelCostello*, 462 U.S. at 168.[6] Under § 10(b), once an employer and a union resolve a collective-bargaining dispute, the parties ordinarily will know within six months whether that resolution is being challenged. If no challenge is received within that time period, the parties are entitled to treat their agreement as final, and as thereby establishing "the law of the shop"; if a challenge is received, the parties will have the opportunity to address promptly the source of the challenger's dissatisfaction.

DelCostello borrowed § 10(b), rather than state law, precisely because the provision has these consequences; as the Court has explained, § 10(b) "better reflect[s]

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[6] *See also Auto Workers v. Hoosier Corp.*, *supra*, 383 U.S. at 707; *United Parcel Service v. Mitchell*, 451 U.S. 51, 63 (1981); *Clayton v. Automobile Workers*, 451 U.S. 679, 693 (1981). The fact that, under § 10(b), a timely unfair labor practice charge may become the subject of an unfair labor practice complaint issued by the General Counsel of the NLRB at some later date in no way undermines the policy favoring rapid resolution, as petitioner seems to believe, *see* Pet. Br. at 15-16, because statutes of limitations cannot protect potential defendants from prolonged proceedings *once litigation is commenced in a timely fashion.*

the balance that Congress would have preferred between the substantive policies underlying the federal claim and the policies of repose." *Wilson v. Garcia, supra*, 53 L.W. at 4483. Yet as the lower court observed, a rule that required plaintiffs only to file their complaints within six months would mean, for cases brought in federal court, that service need be accomplished only within the time limits established by Rule 4 of the Federal Rules of Civil Procedure which would "increase the time limit for initiation of the dispute resolution process from six to ten months, a substantial addition." Pet. App. 6a.[7] Such an addition would, by its very nature, substantially delay the point at which a grievance resolution becomes final and thus would alter fundamentally the balance struck by Congress.

Furthermore, fair-representation cases may be filed in state court as well as federal court. *See e.g., Vaca v. Sipes*, 386 U.S. 171 (1967). Rule 4 does not apply in state courts and some states may allow even a longer period of time to effect service, thereby further retarding the interest in rapidly resolving labor disputes. And, in any event, the very fact that absent application of the § 10(b) service requirement, the states would be free to apply their own rules for determining whether the statute of limitations has been satisfied would undermine *DelCostello*'s attempt to establish a uniform rule for

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[7] Rule 4(j) of the Federal Rules of Civil Procedure provides, as follows:

> "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant . . .

By its terms, then, Rule 4(j) allows *at least* four months for effecting service, and a longer period for "good cause."

determining when the policies of repose prevail and when a labor dispute can be deemed to be finally resolved.[8]

D. Petitioner advances two contrary arguments, neither of which can withstand analysis.

(1) Petitioner places his principal reliance on what he terms the "normal federal rule" that a "statute of limitations is satisfied by filing the complaint." Pet. Br. at 7. Petitioner traces this "normal rule" to Rule 3 of the Federal Rules of Civil Procedure, claiming that "every court of appeals which has considered the question has decided that Rule 3 . . . determines what steps are necessary to satisfy the statute of limitations when litigating a federal claim in federal court . . ." Pet. Br. at 7. And petitioner contends that this "normal rule" is controlling here as well:

> [U]nder the reasoning of *DelCostello*, respondents cannot justify turning to section 10(b) to borrow its service requirements unless they can identify "a gap in federal law" that needs to be filled. But no such borrowing is needed because Federal Rule 3 supplies the rule to govern this case. [Pet. at 13]

Petitioner's understanding of Rule 3 is fatally flawed. That Rule does *not* "govern[] the satisfaction of the statute of limitations," Pet. Br. at 8, nor does it "suppl[y] the rule to govern this case," *id.* at 13. *Walker v. Armco Steel Corp., supra*, is squarely contrary to petitioner's theory.

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[8] Petitioner suggests that application of F.R. Civ. P. 4 would not disserve the policy of § 10(b) because "a union or employer . . . could call the district court immediately after the six months has run to learn whether a complaint has been filed against it." Pet. Br. at 14. But what court is the putative defendant to call? As noted in text, fair representation suits may be brought in state or federal court. Moreover, many employers and unions (including all national unions) are subject to jurisdiction in more than one federal court. Thus it is wholly impractical to make a phone call to ascertain whether a complaint has been filed.

In *Walker*, the Court reaffirmed the holding of *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), that in a diversity case state law determines whether a statute of limitations has been satisfied. In doing so, the *Walker* Court recognized the governing force in diversity cases, as in all other federal-court litigation, of a valid Federal Rule of Civil Procedure which "is sufficiently broad to control the issue before the Court." *Walker*, 446 U.S. at 749-50. But the *Walker* Court nonetheless concluded that *Ragan* properly held state law controlling on whether the statute of limitations had been met because " '*there* [*is*] *no federal rule which cover*[*s*] *the point.*' " *Walker*, 446 U.S. at 750 (emphasis added). The Court explained:

> "Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." [*Id.* at 750 n.10, *quoting* 4 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1057, p. 191 (1969)]

Nor is there any other source of federal law which establishes a uniform "rule in federal question cases . . . that the statute of limitations is satisfied by filing a complaint within the required time." Pet. Br. at 6. The cases on which petitioner relies (Br. at 7-8 & n.2), although containing occasionally broader dictum, actually establish a narrower proposition, one that is of no relevance here: in federal-question cases in which the applicable statute of limitations requires that an action be "brought," "begun," "filed," or "commenced" within a specified period of time, Rule 3 controls the determination of what steps are required to satisfy such a requirement.[9] That is, of

[9] That is true of the cases petitioner cites which involved the application of an express federal statute of limitations as well as the cases which involved a borrowed statute of limitations. *Baldwin County Welcome Center v. Brown*, 446 U.S. 147 (1984), discussed at Pet. Br. at 9, is illustrative of the first category. At issue in that case was the timeliness of a complaint under Title VII of the Civil Rights Act of 1964; that statute requires that "a civil action . . . be brought" within 90 days of the issuance of a right-to-sue notice by the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5(f)(1). The Court accordingly looked to Rule 3 to see if the action had been "brought" within the requisite time period. *See also Moore Co. v. Sid Richardson Carbon & Gas Co.*, 347 F.2d 921 (8th Cir. 1965) (antitrust suit; 15 U.S.C. § 15b requires that action be "commenced" within four years); *United States v. Wahl*, 583 F.2d 285 (6th Cir. 1978) (suit by United States; 28 U.S.C. § 2415(a) requires that "complaint be filed" within six years); *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184 (5th Cir. 1980) (Title VII suit); *Jordan v. United States*, 694 F.2d 833 (D.C. Cir. 1982) (Tort Claims Act suit; 28 U.S.C. § 2401(b) requires that "action is begun" within six months); *Perkin Elmer v. Trans Med. Airways*, 107 F.R.D. 196 (E.D.N.Y. 1985) (suit under Warsaw Convention; 49 U.S.C. § 1502 note requires that suit be "brought" within two years.

The cases petitioner cites involving a "borrowed" statute of limitations are in accord. For example, in *Bomar v. Keyes*, 162 F.2d 136 (2d Cir. 1947), which was discussed by this Court in *Ragan* and on which petitioner relies here, Pet. Br. at 7-8, all that the court decided was that the Federal Rules of Civil Procedure supersede "§ 17 of the New York Civil Practice Act, which fixed the beginning of the action at the date when the writ is served, or is put into the sheriff's hands for service." *Id.* at 140. The Second Circuit expressly *declined* to decide whether a service requirement would be applicable if it were "annexed as a condition to the very right of action created." *Id.* at 140-41. *See also Jackson v. Duke*, 259 F.2d 3 (5th Cir. 1958) (borrowing state statute of limitations which requires that action "be commenced . . . within two years"); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984) (borrowing D.C. Code § 12-301(8) which requires that suit be "brought" within three years); *Cohn v. Board of Education*, 536 F. Supp. 486 (S.D.N.Y. 1982) (borrowing N.Y. Civ. Prac. Law § 2412(2) which requires that suit be "commenced" within three years); *Gutierrez v. Vergari*, 499 F. Supp. 1040 (S.D.N.Y. 1980) (same); *Wells v. Portland*, 102 F.R.D. 796 (D. Ore. 1984) (borrowing Ore. Rev. Stat. § 30.275(8) which requires that action be "commenced" within two years).

course, a fair and proper reading of Rule 3, because the Rule in terms defines the "commence[ment]" of an ac-

tion in federal court.[10] But none of the cases petitioner cites, nor any other authority of which we are aware, holds that where the statute of limitations that has been borrowed for a particular federal cause provides that filing and service must take place within a specified period, the judiciary is free to nullify the service requirement of that statute.[11]

(2) Petitioner alternatively argues that "borrowing the service requirement in section 10(b) would seriously harm the policies underlying both *DelCostello* and the DFR because "adoption of a rule requiring service within six months would have the effect of substantially shortening the time period within which DFR complaints must be filed." Pet. Br. at 20, 18. Again, petitioner is mistaken.[12]

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[10] *Walker* teaches that in diversity cases, Rule 3 does not govern the determination of when an action is "commenced" for purposes of a state statute of limitations; that is clear from the fact that in *Walker* the Oklahoma statute that was deemed controlling, Okla. Stat. Tit. 12, § 97, in terms defined when "[a]n action shall be deemed *commenced.*" But the Court in *Walker* left open the "role of Rule 3" in federal question litigation. 446 U.S. at 751 n.11. Thus the cases cited by petitioner and discussed in n.10 *supra* can survive *Walker* so long as they are understood to establish only the proposition stated in text, and are not read to hold that under Rule 3 "commencement" necessarily satisfies a statute of limitations.

[11] *See also Howard v. Lockhead-Georgia Co.*, 742 F.2d 612, 613 (11th Cir. 1984):

> As a general rule, an action is "commenced" in federal court by the filing of a complaint. The general rule expressed governs when the statute of limitations merely requires that an action be "brought," "commenced," or "initiated" within a specified time. Here, however, Section 10(b) expressly requires both filing *and* service within a six month period. [Emphasis in original]

[12] Petitioner also suggests that requiring service within six-months would disserve *DelCostello*'s policies in a second way, as such a rule "could . . . have the effect of making the suit against the union untimely, while the suit could proceed against the em-

It is, of course, true that a rule that allows a would-be-plaintiff six months to file a complaint is different—and more favorable to the plaintiff—than a rule that establishes a six-month limit for filing and service. When compared to the former rule, the latter rule does, indeed, "shorten[] the time period within which DFR complaints must be filed"; conversely, when compared to the latter rule, the former rule broadens that time period to precisely the same extent. It is for this very reason that we have argued that the so-called "service requirement" stated in § 10(b) cannot be divorced from the time-period contained in that provision. Pp. 8-9 *supra*. And in arguing that "requiring service within six months would have the effect of substantially shortening the time period within which DFR complaints must be filed," petitioner assumes an *a priori* answer to the very question that is in dispute here.[13]

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ployer, or visa versa." Pet. Br. at 20. But that risk exists even if service is not required within six-months, because, in any event, F.R. Civ. P. 4 establishes a deadline for effecting service, *see* n.7 *supra*, and that deadline may be met as to some but not all defendants. Moreover, *DelCostello* teaches that it is *not* contrary to the national labor policy for a fair-representation/breach-of-contract suit to proceed against only the employer or the union, so long as there is not a different limitations period applicable to one defendant. *See* 462 U.S. at 165 ("The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both").

[13] We hasten to add that petitioner's argument greatly overstates the difference between requiring filing within the limitations period and requiring filing and service during that time period. Petitioner assumes that a service requirement necessarily means that service must be received within the limitations period, although as previously noted, the NLRB has reached the opposite conclusion in applying § 10(b). *See* n.9 *supra*. Moreover, even if it were necessary to complete service within six months in order to satisfy § 10(b), petitioner's lengthy discussion of "the vagaries of completing service," Pet. Br. at 19, ignores the fact that, at least in federal court, "[a] summons and complaint may be served . . . by mailing a copy . . . (by first-class mail, postage prepaid) to the person to be served," F.R. Civ. P. 4(c)(2)(C)(ii), and that a de-

Indeed, when all is said and done, petitioner's argument reduces to the proposition that six months is too short a period of time to require both the filing and serving of a DFR/breach-of-contract complaint.[14] What petitioner ultimately asks the Court to do, then, is "balance . . . the policy interests at stake," Pet. Br. at 10 n.4, and decide on its own what is an appropriate period of time to allow fair-representation/breach-of-contract plaintiffs to file and serve their complaints. But as we have seen, statutes of limitations are "borrowed" rather than judicially invented precisely because determining what constitutes an appropriate limitations period is not a judicially-manageable task. And for that same reason, when a statute is borrowed, that statute controls "questions of tolling and application." Pp. 7-8, *supra*.

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fendant who refuses such service without "good cause" is liable for costs, F.R. Civ. P. 4(c)(2)(D). That is, indeed, how service was effected in this very case, and each defendant acknowledged service within eleven days of mailing. (Section 10(b) does not speak to how service is to be effected and thus, contrary to petitioner's suggestion, *see* Pet. Br. at 21-22, Rule 4 will govern the manner of effecting service regardless of how the instant case is resolved.)

[14] In making this argument petitioner places great weight on his assertion that "the lawyers who are willing to take DFR cases often have little or no prior knowledge of what is required in a DFR suit." Pet. Br. at 17. But a lawyer accepting a fair representation case will be required to research the statute of limitations and surely can be expected to become aware of whatever decision is reached by his Court in this case, just as such a lawyer will learn of the holding of *DelCostello*. And the rules governing how complaints are to be served do not differ for fair-representation litigation, Thus, even assuming *arguendo* the validity of plaintiff's assertion—and in our experience, there is a growing bar of lawyers experienced in representing plaintiffs in fair-representation litigation—that assertion has virtually nothing to do with the issue in this case just as such a lawyer will learn of the holding of *DelCostello*. Indeed, without acknowledging it, petitioner actually is attempting to relitigate the Court's decision in *DelCostello* to borrow an administrative statute of limitations and apply it to a judicial cause of action. *Cf. Burnette v. Gratten, supra.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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